

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

**FILED**

MAR 13 2013

Clerk, U S District Court  
District Of Montana  
Billings

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**JAMES M. SHEA,**

**Petitioner,**

**vs.**

**LEROY KIRKEGARD, Warden,  
Montana State Prison; ATTORNEY  
GENERAL OF THE STATE OF  
MONTANA,**

**Respondents.**

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**CV-12-121-BLG-RFC-CSO**

**ORDER ADOPTING FINDINGS  
AND RECOMMENDATIONS OF  
U.S. MAGISTRATE JUDGE**

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (doc. 3) with respect to James M. Shea's 28 U.S.C. § 2254 petition for writ of habeas corpus (doc. 1). Judge Ostby recommends the petition be denied on the merits because the record indicates he was convicted of DUI in 1990, making his 2009 DUI conviction his fourth. As such, Shea was appropriately convicted of felony DUI and designated a persistent felony offender under Montana law.

Upon service of a magistrate judge's findings and recommendation, a party

has 14 days to file written objections. 28 U.S.C. § 636(b)(1). Shea filed timely objections on January 22, 2013 (doc.4) which he supplemented on March 7, 2013 (doc. 5). Accordingly, the Court must make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1).

All of Shea's 5 objections are aimed at the validity of the "Court Minutes" relating to his October 25, 1990 conviction. Shea claims that Judge Ostby incorrectly relied on the "Court Minutes" because they do not include his name or case number and there is nothing proving those "Court Minutes" relate to him. Shea further objects that they are not dated or signed by the presiding judge.

Regardless, it is Shea's burden to prove that he is entitled to relief and it was Shea that supplied the "Court Minutes" in support of his Petition. He cannot submit a document as evidence of his claim and then argue it is invalid when it is used against him. More importantly, a letter from the Missoula Police Department also submitted by Shea in support of his Petition confirms that the "Court Minutes" came from Missoula Municipal Court records. Doc. 1-2, p. 71. As such, Magistrate Judge Ostby properly relied on the "Court Minutes" in concluding that Shea's October 25, 1990 conviction was for DUI, not for driving with an excessive BAC.

After a de novo review, the Court determines Magistrate Judge Ostby's Findings and Recommendation of are well grounded in law and fact and are adopted in their entirety.

Accordingly, **IT IS ORDERED** that Shea's Petition (doc. 1) is **DENIED** on the merits.

**IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

The Clerk of Court shall enter by separate document a judgment in favor of Respondents and against Petitioner.

DATED this 13 day of March, 2013.



RICHARD F. CEBULL  
UNITED STATES DISTRICT JUDGE